Editor's note: appealed -- reversed, Civ.No. 82-1189 (D.D.C.); also appealed sub nom. Geosearch v. Getty Oil -- dismissed Civ. No. 82-0468 (D.Wyo. (March 31, 1983); remanded to D.Ct. No. 83-1652 (10th Cir.Jan. 19, 1984)

JAMES KOCH ET AL.

IBLA 80-802 Decided January 28, 1982

Appeal from a decision of the Wyoming State Office, sustaining in part protest against the issuance of oil and gas lease W 56952, dismissing bona fide purchasers from the proceeding, and giving a notification of intent to sue for cancellation of overriding royalties.

Affirmed.

1. Oil and Gas Leases: Applications: Sole Party in Interest

When an individual files an oil and gas lease offer through a leasing service under an agreement whereby the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment, or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and in any payments of overriding royalties retained. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b).

2. Estoppel--Oil and Gas Leases: Applications: Generally

The requirement that an oil and gas lease offeror disclose all parties in interest is not ambiguous, and the rejection of offers filed prior to this Board's decision in Lola I. Doe, 31 IBLA 394 (1977), for violation of the regulations requiring disclosure of such interests and prohibiting multiple filings did not constitute a

retrospective application of a new Departmental interpretation of the regulations.

3. Oil and Gas Leases: Applications: Drawings--Oil and Gas Leases: Assignments or Transfers--Oil and Gas Leases: Bona Fide Purchaser

An assignee of a Federal oil gas lease who qualifies as a bona fide purchaser is protected from cancellation or forfeiture of his interests notwithstanding the violation by his assignor, the first drawee in the simultaneous oil and gas lease drawing, of regulations concerning undisclosed parties in interest. 30 U.S.C. § 184(h)(2) (1976); 43 CFR 3102.1-2.

4. Oil and Gas Leases: Assignments or Transfers--Oil and Gas Leases: Bona Fide Purchaser--Words and Phrases

"Bona fide purchaser." A bona fide purchaser of an interest in a Federal oil and gas lease must have acquired his interest in good faith, for valuable consideration, and without notice of violation of Departmental regulations. Assignees are deemed to have constructive knowledge of all BLM records pertaining to the lease at the time of assignment.

5. Oil and Gas Leases: Assignments or Transfers--Oil and Gas Leases: Bona Fide Purchaser

A "remote purchaser," that is, one who purchases an oil and gas lease interest from a bona fide purchaser, is protected just as is the latter, even where it is chargeable with knowledge that there may have been a legal discrepancy when the lease was initially issued.

6. Oil and Gas Leases: Bona Fide Purchaser--Oil and Gas Leases: Cancellation--Oil and Gas Leases: Overriding Royalties

An overriding royalty interest retained by a lessee after he has assigned the

> lease to a bona fide purchaser is voidable and subject to cancellation where it is revealed that the lessee's original lease offer failed to disclose the existence of another party in interest in the offer. Any overriding royalties which the lessee assigned to the other party in interest are also properly subject to cancellation as this party is not a bona fide purchaser thereof, having had actual knowledge of the defect in the lease. BLM must sell such canceled overriding royalty interests as provided in 30 U.S.C. § 184(h) (1976) and 43 CFR 3102.1-2(b).

APPEARANCES: David B. Kern, Esq., Milwaukee, Wisconsin, for appellant, James M. Koch, and Resource Service Company, Inc.; Melvin Leslie, Esq., Salt Lake City, Utah, for Carrie Garner and Geosearch, Inc.; Harold J. Baer, Jr., Esq., Denver, Colorado, for the Bureau of Land Management; and Robert G. Pruitt, Jr., Esq., Salt Lake City, Utah, for Getty Oil Company, Intervenor.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Once again, matters relating to oil and gas lease W 56952 are brought to this Board. In the initial case, styled Geosearch, Inc., 41 IBLA 291 (1979), appellant Geosearch argued that this lease, among several other oil and gas leases, had been improperly issued to a first priority offeror who should have been disqualified. Geosearch, as purchaser of such interests in these various leases held by second and third priority offerors, protested the validity of the leases, arguing in each case that the Resource Service Company, Inc. (RSC) had an undisclosed interest in each of the offers afforded first priority. Each first priority offeror had entered into a service agreement with RSC, a leasing service. The Bureau of Land Management (BLM) denied the various protests noting that, since all of the leases had issued (except one not relevant herein) and the majority of them had been assigned, "we do not believe the number 2 drawees of these simultaneous oil and gas drawings have an interest to assign to Geosearch Inc." Geosearch, Inc., supra at 292. BLM did not examine the question of whether the underlying offers in the leases were, in fact, defective. Geosearch timely appealed.

In Geosearch, Inc., supra, the Board first noted that, inasmuch as BLM had not returned the drawing cards of those drawn with second and third priority and had not, in the alternative, officially notified them that their offers were rejected, their offers remained viable. While the Board agreed that any bona fide purchasers would be protected under 30 U.S.C. § 184(h)(2) (1976), the Board pointed out that not only was there a possibility that some of the assignees were not bona fide purchasers but also noted that the majority of assignees had not even asserted that they had bona fide purchaser status. Accordingly, the Board vacated the decision of BLM, instructed the State Office to join

the assignees to the protest proceeding and to consider, first, whether the underlying offers were defective, and, if they were, to then ascertain the bona fides of any assignee. The Board also noted that where an assignee asserted a bona fide purchaser status, it was up to Geosearch to establish prima facie to the contrary.

On remand, BLM first found that James M. Koch, the priority drawee for parcel WY-80, listed September 20, 1976, filed his simultaneous oil and gas lease offer pursuant to an agreement which gave RSC an interest (as defined in 43 CFR 3100.0-57(b)) in the offer which was required to be disclosed pursuant to 43 CFR 3102.7 (1979), citing the Board's decision in Frederick W. Lowey, 40 IBLA 381 (1979), and Lola I. Doe, 31 IBLA 394 (1977). 1/ This interest consisted of the exclusive right of RSC to participate in the proceeds from any sale or assignment of the lease for a 5-year period after lease issuance. BLM determined that the first drawee's offer had violated the party in interest disclosure requirements. 2/ BLM also held that a purported disclaimer of interest that RSC had submitted to BLM on January 13, 1977, was ineffective to avoid the regulatory violation. Having determined that the underlying offer of Koch had, indeed, been defective, BLM then examined the status of the assignees.

The decision noted that the lease in dispute issued December 2, 1976, effective December 1, 1976. On December 30, 1976, an assignment of 100 percent record interest in the lease from Koch to A. G. Andrikopoulos was filed with BLM. This assignment had been executed on December 15, 1976, and reserved an overriding royalty interest of 5 percent in Koch. The BLM decision noted that payment under this assignment was made on December 30, 1976. On January 17, 1977, Getty Oil Company filed an assignment from Andrikopoulos of 100 percent record interest in the lease, reserving a 1 percent overide to Andrikopoulos. 3/ This assignment had been executed on December 21, 1976. 4/ Both assignments were approved on February 16, 1977; the assignment from Koch to Andrikopoulos with an effective date of January 1, 1977, and the assignment from Andrikopoulos to Getty with an effective date of February 1, 1977. On October 3, 1977, an executed assignment by Koch to Fred L. Engle, d.b.a. Resource Service Company, of part of the reserved 5 percent override, was filed with BLM. Finally, on October 25, 1977, Andrikopoulos assigned his reserved

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1/ The Board's decision in Frederick W. Lowey, supra, was subsequently affirmed in Lowey v. Watt, 517 F. Supp. 137 (D.D.C. 1981).

2/ The BLM decision also noted that, to the extent RSC had filed for other clients on the same parcel, such filings also constituted a prohibited multiple filing under 43 CFR 3112.5-2 (1979).

3/ The assignment had apparently been erroneously transmitted earlier to the Montana State Office as it bears a Montana date stamp of Jan. 7, 1977.

4/ Although BLM's decision did not indicate when payment was made by Getty, an affidavit provided by Andrikopoulos indicates that it was made within a week of their agreement.

1 percent override to C. L. Scribner. Geosearch's protest was filed on October 3, 1978. 5/

BLM's decision held that Getty should be dismissed from the proceedings, noting that Getty had acquired its interest prior to the Board's decision in Lola I. Doe, supra, and that nothing in the records of the State Office could, at that time, fairly be said to put Getty on notice, actual or constructive, of any violation of the regulations by Koch. Similarly Scribner was dismissed from the proceeding since, while his assignment was executed after the decisions in Lola I. Doe, supra, and Sidney H. Schreter, 32 IBLA 148 (1977), "those decisions were neither concerned with the lands involved herein nor were they mentioned in the lease file until after he had been assigned said interest." Noting that Geosearch had failed to allege any facts to challenge Getty's status as a bona fide purchaser, the State Office declined to order a fact-finding hearing.

Finally, the decision advised that BLM would initiate suit to cancel the overriding royalty interests of RSC and Koch and, upon the successful cancellation of such interests, they would be put up for competitive bidding pursuant to 30 U.S.C. § 184(h)(2) (1976).

[1, 2] Koch, RSC, Geosearch, and Carrie Garner, the number two drawee, have all appealed to this Board. While Koch and RSC still dispute that the leasing service agreement gave RSC an "interest" in Koch's offer, as this Board held in Lola I. Doe, supra, the major focus of their appeal is on whether the Doe decision should be given "retrospective effect." In this regard they also advert to the January 13, 1977, waiver-disclaimer as evidence of RSC's good faith.

RSC's retrospective effect argument has been considered and rejected in a number of cases. See, e.g., Inexco Oil Co., 54 IBLA 260 (1981); Home Petroleum Corp., 54 IBLA 194, 204, 88 I.D. 479, 484 (1981); D. R. Weedon, Jr., 51 IBLA 378 (1980), appeal dismissed, Weedon v. Watt, Civ. No. 81-749 (D.D.C. Oct. 9, 1981). As we noted in D. R. Weedon, Jr., supra, neither RSC nor its clients were in the status of "innocent offerors" inasmuch as both had participated in the creation of the illegal interest. We also pointed out that:

> No one who held or granted the exclusive right to participate in a precise share of any proceeds from the sale or assignment of the lease and from any proceeds derived from retained overriding royalties could possibly entertain any serious doubt that such a right constituted an "interest" within the context of this regulation.

5/ It should also be noted that a communitization agreement involving the NW 1/4 sec. 5 was approved by the Geological Survey on June 10, 1977, with an effective date of Feb. 1, 1977. On May 30, 1977, a well was completed under this agreement and the lease was placed under minimum royalty.

> * * * To hold that, upon a finding of violation, the Department must forego remedial action until a similar violation is discovered in the future would be to hold that a person may violate the regulation with impunity until discovered, but not thereafter.

Id. at 384. We adhere to our prior holding.

We have also noted in many cases that the purported waiver-disclaimer was ineffective as it was a unilateral action unsupported by consideration and was not communicated to the other parties. See, e.g., Frederick W. Lowey, supra; Alfred L. Easterday, 34 IBLA 195 (1978). In any event, inasmuch as this lease had been both issued by the Department and assigned by Koch through the agency of RSC prior to the disclaimer, we fail to see how the disclaimer is efficacious as it relates to the instant lease. We find, therefore, that the offer of Koch was fatally defective and should have been rejected.

Geosearch and Carrie Garner appeal from BLM's decision on two separate grounds. First, they object to that part of the decision which found Getty and Scribner to be bona fide purchasers. Second, they argue that such interests as are canceled should not be put up for sale by competitive bid but rather should be issued to them as the next qualified offeror.

Initially, we note that the State Office never joined Scribner to this proceeding. Thus, Scribner never appeared and asserted that he was a bona fide purchaser of his 1 percent overriding interest. While this omission may have been occasioned by the fact that BLM does not approve royalty assignments, we believe that this was a mistake. However, as we shall show, the error was harmless.

The major focus of Geosearch's appeal is that Getty was not a bona fide purchaser, since, according to Geosearch, both Getty and its assignor, Andrikopoulos, knew or should have known that RSC had a prohibited interest in Koch's offer.

[3, 4] As this Board has noted, the interest in a Federal oil and gas lease held by a bona fide purchaser is not subject to cancellation even though the lease offer filed by a predecessor in title was defective and the lease was subject to cancellation while title was held by the predecessor. 30 U.S.C. § 184(h)(2) (1976); 43 CFR 3102.1-2. A bona fide purchaser must have acquired his interest in good faith, for valuable consideration, and without notice of violation of Departmental regulations. Winkler v. Andrus, 614 F.2d 707, 711 (10th Cir. 1980); Southwestern Petroleum Corp. v. Udall, 361 F.2d 650, 656 (10th Cir. 1966). Assignees who seek to qualify as bona fide purchasers are deemed to have constructive knowledge of all BLM records pertaining to the lease at the time of assignment. Winkler v. Andrus, supra at 713.

Geosearch alleges that Getty had actual or constructive knowledge of the service agreement between Koch and RSC which created the undisclosed interest in the lease offer and, therefore, that Getty cannot qualify as a bona fide purchaser. Geosearch contends that previous dealings with RSC and with other clients of RSC should have alerted Getty to a pattern of operations which, in turn, should have alerted Getty to the probability of an agreement between RSC and Koch that would violate Federal oil and gas leasing regulations. Geosearch alleges that mesne conveyors also should have known of such an agreement. We do not agree.

As we have pointed out in the past, while the general rule is that the relevant date to determine bona fides is the date that the consideration for the assignment was paid, Winkler v. Andrus, 614 F.2d at 712, citing 77 Am. Jur. 2d, Vendor & Purchaser § 706 (1975), the Tenth Circuit stated in Winkler that the critical time was instead when the agreement was formed. However, here, as in Winkler, it is immaterial whether the critical time is regarded as the date the parties agreed to the assignment or the date the consideration was paid.

As both the intervenor, Getty, and the Regional Solicitor point out, the lease in the instant case issued on December 2, 1976, and was assigned to Andrikopoulos under an agreement dated December 15, 1976. Payment by Andrikopoulos to Koch was made on December 30, 1976. The assignment from Andrikopoulos to Getty was executed on December 21, 1976, and payment was apparently made within a week thereof.

At the time both of these assignments were made, there was nothing in the case file which would have put either Andrikopoulos or Getty on notice that there was a defect in Koch's offer. The RSC agreement was not a part of the case record. There was no pending protest. We have noted in the past that the mere fact that an offeror was a client of RSC did not establish that the arrangement which we found violative of the regulations in Lola I. Doe, supra, had been entered into in every case. See, e.g., Wilbur G. Desens, 54 IBLA 271, 278 (1981); Inexco Oil Co., supra at 267. In any event, we would point out that in the instant case both assignments occured not only prior to the Board's decision in Doe, but also before the Wyoming State Office had rejected Doe's offer on the basis of a protest. We find, therefore, that both Andrikopoulos and Getty were bona fide purchasers for value. Geosearch's suppositions and arguments to the contrary are insufficient to establish, prima facie, that such, in fact, was not the case. See Geosearch, Inc. v. Andrus, 508 F. Supp. 839, 846 (D. Wyo. 1981).

[5] Insofar as Scribner is concerned, we note that as a "remote purchaser" from Andrikopoulos, it is irrelevant whether Scribner knew or should have known of the defect in Koch's offer. As we said in Home Petroleum Corp., supra:

> It is a general rule that a remote purchaser of real estate whose purchase does not fulfil all the requisites for protection due a bona fide purchaser may nevertheless be accorded protection because of his purchase from one who is entitled thereto. The purpose of this rule is to prevent a stagnation of property and to protect the first purchaser who, being entitled to hold and enjoy, must be equally entitled to sell. Otherwise, a bona fide purchaser might be prevented from selling his property for full value. In other words, the vendee of the bona fide purchaser is not favored on his own account, but for the sake of him from whom he purchased. It is wholly immaterial of what nature the outstanding interest is, whether it is a lien or encumbrance, or a trust, or any other claim. [Footnotes omitted.]

Id. at 213, 88 I.D. at 489 (citing 77 Am. Jur. 2d, Vendor & Purchaser, § 718 (1975). Thus, since Scribner purchased his 1 percent overriding interest from Andrikopoulos, whom we have found to be a bona fide purchaser, it is not necessary for Scribner to show his own bona fides.

[6] The final issue to be decided relates to Geosearch's objection to BLM's offering for sale any retained interests of Koch and RSC which are canceled. As we noted above, Garner's offer had not been rejected so that it remained viable should it be determined that Koch's offer was defective. We have also recognized that both Getty and Scribner are protected by the provisions of 30 U.S.C. § 184(h)(2) (1976). That provision also states:

> If, in any such proceeding, an underlying lease, interest, option, or permit is canceled or forfeited to the Government and there are valid interests therein or valid options to acquire the lease or an interest therein which are not subject to cancellation, forfeiture, or compulsory disposition, the underlying lease, interest, option, or permit shall be sold by the Secretary to the highest responsible qualified bidder by competitive bidding under general regulations subject to all outstanding valid interests therein and valid options pertaining thereto. Likewise if, in any such proceeding, less than the whole interest in a lease, interest, option, or permit is canceled or forfeited to the Government, the partial interests so canceled or forfeited shall be sold by the Secretary to the highest responsible qualified bidder by competitive bidding under general regulations.

Thus, the offer of Garner must be rejected, and the action of the State Office returning the drawing entry card of Garner and the number three drawee is affirmed. See Geosearch, Inc. v. Andrus, supra at 845.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed for the reasons stated herein.

James L. Burski
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge